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No. 90-768

In The
Supreme Court of the United States
October Term, 1990

CONRAD PETER,
Petitioner,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an employee claims injury in the "twilight zone" of concurrent application of federal and state workers' compensation schemes, did the court of appeals err in holding that the employee is barred by the exclusive remedy provision of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* from filing a damage action in tort for negligence based on the law of the Virgin Islands against his employer for purposes of the Longshore Act?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Hess Oil Virgin Islands Corporation ("HOVIC")[1] respectfully requests that this Court deny the petition for writ of certiorari submitted by petitioner Conrad Peter seeking review of the Third Circuit's decision in this case.

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[1] Respondent HOVIC is a wholly owned subsidiary of Amerada Hess Corporation, a publicly owned corporation. Respondent HOVIC has no non-wholly-owned subsidiaries. This information is supplied pursuant to Rule 29.1 of this Court's Rules.

STATEMENT OF THE CASE

Petitioner filed an action based on the tort law of the Virgin Islands against HOVIC in the United States District Court for the Virgin Islands. Petitioner sought damages for an injury he claimed he received as a result of exposure to jet fuel while loading tanker vessels while on those vessels and on the docks at HOVIC's refinery in St. Croix. Pet. App. at 2a, 5a.

Petitioner was a "borrowed employee" of HOVIC; while his initial employment was with Litwin Panamerican Corporation, a labor broker, Litwin had an agreement with HOVIC "to provide personnel for general maintenance and turnaround work at [HOVIC's] refinery." Pet. App. at 14a. Petitioner was one of a group of Litwin personnel "who were furnished to work under [HOVIC's] exclusive direction and control and for whose workmanship Litwin was not responsible to [HOVIC]." *Id.* Petitioner signed an agreement recognizing that he would be working under HOVIC's sole direction, and that HOVIC, "via Litwin, was the provider of his salary and . . . coverage" under the Longshore[2] and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("Longshore Act"). Pet. App. at 14a-15a.

Before trial, HOVIC filed a motion asserting that petitioner's claim was precluded by the exclusive liability provision of the Longshore Act, 33 U.S.C. § 905(a), because Peter was HOVIC's borrowed employee and was injured during the course of maritime employment. *See* Pet. App. at 45a-46a. The district court took the motion under

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[2] In 1984, Congress changed the initial word in the name of this statute from "Longshoremen" to "Longshore." Pub. L. No. 98-426, 98 Stat. 1654 (1984).

consideration; the trial went forward; and the jury returned a verdict in favor of Peter in the amount of $1.2 million, after adjustment for Peter's contributory negligence. Pet. App. at 44a-46a. The district court then denied HOVIC's motion to dismiss. The court agreed that Peter was engaged in maritime employment at the time of his injury and, hence, that his employment was covered by the Longshore Act. Pet. App. at 5a-6a, 46a. Because it found that the injury was partly caused by exposure on the docks, the district court concluded that Peter was injured in the twilight zone, the area of concurrent jurisdiction in which state compensation remedies are permitted to coexist with the Longshore Act. Relying on this Court's decision in *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715 (1980), the district court held that "Federal law does not provide an exclusive remedy and in no way preempts the Virgin Islands law." Pet. App. at 46a.

The borrowed-employee doctrine had been abolished by the Virgin Islands, 24 V.I.C. § 263a. This meant that HOVIC was not petitioner's employer under that territory's workers' compensation act, even though petitioner worked under HOVIC's sole direction and HOVIC paid his salary and provided for his workers' compensation coverage. Accordingly the Virgin Islands law did not bar petitioner from suing HOVIC in tort. Pet. App. at 45a-46a. Thus, in the district court's view, petitioner was entitled to a tort remedy under Virgin Islands law, even though the Longshore Act provides that its remedy "shall be exclusive and in place of all other liability of such employer to such employee . . . to recover damages at law or in admiralty . . . ." 33 U.S.C. § 905(a).

The Third Circuit reversed. Agreeing with other courts that had considered the question under the Longshore Act and with workers' compensation law generally (*see* Pet. App. at 8a-11a), it held that a borrowing employer is the employer for

Longshore Act purposes and that, based upon a substantial trial record, "no reasonable trier of fact could conclude from that record that Peter was not [HOVIC's] borrowed servant." Pet. App. at 13a. Quoting from this Court's opinion in *Morrison-Knudsen Construction Co. v. Director, OWCP,* 461 U.S. 624, 636 (1983), the court of appeals pointed out that, like other workers' compensation statutes, the Longshore Act

> was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and the employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail.

Pet. App. at 33a.

The court of appeals then held that the twilight zone, the area in which state and federal compensation schemes may concurrently apply, is a "judicial construct" born of "necessity" to afford injured workers certain access to a federal or state workers' compensation scheme. Pet. App. at 35a. However, it held, the existence of the twilight zone did not permit petitioner to have a state common law tort action for negligence (rather than a state compensation remedy) despite the concurrent application of the Longshore Act compensation provisions. That would "not further the availability of no-fault compensation for injured maritime workers: it simply obstructs the purposes of [the Longshore Act] by depriving

maritime employers of their side of [the Longshore Act]'s *quid pro quo.*" Pet. App. at 36a.

As to the effect of the Virgin Islands' non-recognition of borrowed employees, the court of appeals noted that state attempts to regulate in the admiralty area should not be struck down "absent a clear conflict with federal law," Pet. App. at 32a, quoting *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 341 (1973), but that "a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court." *Id.,* quoting *Pope & Talbot v. Hawn,* 346 U.S. 406, 409-10 (1953).

The court of appeals then held that section 905(a) of the Longshore Act, which provides that liability under the Act shall be the exclusive liability of an employer, established such a "substantial admiralty right", of which HOVIC could not be deprived. Pet. App. at 32a-34a, 36a. It found that section 905(a) "evinces an unmistakable intention to codify the *quid pro quo* that underlies most workmen's compensation statutes -- the employer provides no-fault compensation in exchange for immunity from tort liability for damages." Pet. App. at 32a-33a. The Third Circuit held that "Peter's judgment based on Virgin Islands' law is every bit as disruptive of Congress' *quid pro quo* as would be a negligence judgment based on federal maritime law." Pet. App. at 33a-34a. The court concluded that "where an employer has obtained workmen's compensation coverage for its [Longshore Act] employe[e] under both the [Longshore Act] and the state or territorial statute, § 905(a) and the Supremacy Clause [U.S. Const. art. VI, cl. 2] bar a state or territorial tort recovery against the employer." Pet. App. at 36a-37a.

This is consistent with the purpose of the twilight zone, which is to assure injured workers access to a compensation remedy and should not be applied "in a way that would undermine the policy reflected in § 905(a)." Pet. App. at 35a.

REASONS FOR DENYING THE WRIT

The conflicts asserted by petitioner between the decision of the Third Circuit and decisions of this Court do not exist. The Third Circuit's decision properly effectuates, and is fully consistent with, the language and purpose of the Longshore Act and with the purposes underlying this Court's recognition of a twilight zone within which both the Longshore Act and state workers' compensation acts may apply. Nor is there the "confusion" on these issues among state and lower federal courts asserted by the petitioner.

Finally, the issue presented by the present case is not of sufficient importance to warrant review, and the case may not properly present the issue raised in the petition because an essential antecedent issue was not decided by the court below.

I. The Decision Of The Third Circuit Does Not Conflict With Any Decision Of This Court.

Petitioner asserts (Pet. at 11) that the decision below conflicts with this Court's holdings in *Sun Ship Inc. v. Pennsylvania,* 447 U.S. 715 (1980) and *Hahn v. Ross Island Sand & Gravel Co.,* 358 U.S. 272 (1959)(*per curiam*). According to petitioner, *Sun Ship* holds that, despite the plain provisions of section 905(a), the Longshore Act "permits state remedies -- without limitation -- for workers injured in the 'twilight zone.'" Pet. at 11. But *Sun Ship* provides no support

for the proposition that a state tort remedy may coexist with the federal compensation remedy. "The single question presented" in *Sun Ship* was whether "a State may apply its workmen's compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act . . . ." 447 U.S. at 716. This Court there held that the 1972 amendments to the Longshore Act did not eliminate availability of state *compensation* remedies for workers injured in the "twilight zone." 447 U.S. at 722 (emphasis added). In the present case, the petitioner sought damages from HOVIC under Virgin Islands law on a tort theory based on a claim of negligence, not a workers' compensation remedy. Because state damage remedies were not at issue in *Sun Ship*, that case is not in conflict with the holding of the Third Circuit in the present case. Moreover, even with respect to state compensation remedies, the Court held in *Sun Ship* that a portion of a state compensation act, when applied in the twilight zone, will be preempted if it causes "a conflict with the [Longshore Act]." *Sun Ship*, 447 U.S. at 724 n. 6.[3] *A fortiori*, a state tort action may be preempted where, as here, it has that result.

Thus it is clear that *Sun Ship* does not hold, as petitioner asserts, (Pet. at 11) that in the twilight zone the state remedy must apply "without limitation."

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[3] The Court there noted that the Longshore Act would prevent any employee who had recovered lower state benefits from being barred by any state-law finality provision from then seeking the excess permissible under the Longshore Act.

Nor does this kind of reasoning apply only to protect employees. Immediately following this language in *Sun Ship*, the Court pointed out that the twilight zone was also created to relieve employers from the pressure of the "horns of the jurisdictional dilemma." 447 U.S. at 725.

Petitioner's contention that the Third Circuit's decision conflicts with *Hahn*, 358 U.S. 272, is equally wide of the mark. Although this Court there approved an employee's action for damages against an employer under state law, that damage action was statutorily authorized by, and was in furtherance of, the state's workers' compensation law. That law explicitly subjected the employer therein, who had "rejected the [state] Act's automatic compensation provisions," to suit for damages by the injured employee. 358 U.S. at 273. As the Third Circuit noted (Pet. App. at 36a), the Longshore Act (like most workers' compensation statutes) contains the very same sanction -- subjection to tort litigation -- for an employer who "fails to secure payment of compensation as required by this [Act] . . . ." 33 U.S.C. § 905(a). Thus, the provision for the state damage remedy in *Hahn* was "part of the state's workmen's compensation scheme," was fully consonant with the Longshore Act (which provides for the same remedy in the same circumstances), and was "entirely consistent with Congress's intent to ensure a seamless intersection between state and federal compensation coverage." Pet. App. at 36a. Petitioner asserts (Pet. at 13) that "no language whatsoever in the *Hahn* decision suggests that state tort relief was permitted only as a penalty." But the Court's short *per curiam* opinion in *Hahn* carefully described the limited circumstances (*i.e.*, "reject[ion by the employer of] the [state] Act's automatic compensation provisions," 358 U.S. at 273) in which the state statute authorized an employee to sue for damages on a negligence theory; thus that factor clearly played a part in the Court's reasoning. See G. Gilmore & C. Black, *The Law of Admiralty* 432 n. 335 and accompanying text (2d ed. 1975).[4]

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[4] The petition also asserts (Pet. at 13) that "Peter's right to sue HOVIC is as much a part of the Virgin Islands workmen's compensation scheme as was the local cause of action permitted in *Hahn* . . . ." This is incorrect.

(continued...)

II. The Third Circuit's Decision Is Fully Consistent With The Purpose And Scope Of The Twilight Zone As Created By This Court.

The petition asserts that when an employee's injury occurs in the twilight zone -- the area in which it is unclear whether jurisdiction, if precisely determined, would be federal (because of the "admiralty and maritime" jurisdiction conferred by the United States Constitution, U.S. Const. art. III, § 2, cl. 1) or state -- the employee may have whatever remedy state law may afford, regardless of whether the state-law remedy may conflict with, or be destructive of, the Longshore Act remedy. Pet. at 11-13. This assertion is fundamentally in error. The twilight zone was recognized by this Court solely for the purpose of *facilitating access by employees to a workers' compensation remedy* without suffering the pitfalls inherent in the close issues of federal versus state jurisdiction. This Court intended only to solve the difficulty faced by an injured employee of determining whether the compensation remedy available was under state law or under federal maritime law.[5]

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[4] (...continued)
The provision that authorized suit in *Hahn* was an effective sanction of the employer for failing to participate at all in the compensation scheme. As Professors Gilmore and Black point out, this is a widely used device that creates an incentive toward participation by employers in the workers' compensation system. The Virgin Islands provision at issue here serves no such purpose. Indeed, as petitioner admits (Pet. at 13-14), that provision altered the Virgin Islands law to *narrow* the scope of the Virgin Islands compensation scheme by subjecting a borrowing employer to damage actions. In so doing, the Virgin Islands became virtually unique among state and federal governments in closing off the workers' compensation scheme in such situations. See page 16, *infra*.

[5] The difficulty was caused by the imprecision of the task of applying in particular cases the jurisdictional test imposed by this Court's holding in (continued...)

In *Davis*, 317 U.S. at 254, this Court pointed out that the caselaw applying the jurisdictional test of *Southern Pacific v. Jensen* had caused employees "much serious confusion," delay, expense, and occasional forfeiture of rights by operation of the statute of limitations. Those ill effects, this Court held,

> *defeat*[] *the purpose of the federal act* [*i.e., the Longshore Act*], which seeks to give 'to these hardworking men, engaged in somewhat hazardous employment, the justice involved in the modern principle of compensation,' and the state [workers' compensation] Acts such as the one before us, which aims at 'sure and certain relief for workmen."[6]

Davis, 317 U.S. at 254 (emphasis added).

After then pointing out that the jurisdictional dilemma pressed "as sharply on employers as on employees," because employers could not know with certainty which (state or

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[5] (...continued)
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). Under that decision, states could apply their worker compensation laws only where such application did not "work[] material prejudice to the characteristic features of the general maritime law or interfere[] with the proper harmony and uniformity of that law in its international and interstate relations." 244 U.S. at 216. *See Davis v. Department of Labor,* 317 U.S. 249, 252 (1942); *Sun Ship,* 447 U.S. at 717-719, 720.

[6] [Court's footnote] For this expression of federal policy, see the report of the Senate Committee on the Judiciary on the Longshoremen's & Harbor Workers' Compensation Act, S. R. 973, 69th Cong., 1st Sess., 16. For the expression of public policy of the Washington Act, see Rem. Rev. Stat. (1932) § 7673.

federal) workers' compensation insurance funds to contribute to, the *Davis* Court went on to hold that because "the line separating the scope of the two [state and federal workers' compensation acts] . . . [was] undefined and undefinable with exact precision," *Davis*, 317 U.S. at 255-256, there was "clearly a twilight zone" in which the Court would rely on the presumption of constitutionality of the state act rather than attempting a precise jurisdictional determination. *Id.* at 257-258.

Thus, it is clear that not only was the twilight zone developed strictly to provide a workable solution to the jurisdictional question of state versus federal workers' compensation statutes; but, equally as important, the twilight zone solution was necessary because without it litigation on jurisdictional issues was "defeating the purpose" of *both* the state and federal compensation acts for both employees and employers. *Davis*, 317 U.S. at 254-255. As this Court reaffirmed in *Sun Ship*, the twilight zone exists for the exclusive purpose of facilitating access to *a compensation remedy*. *Sun Ship*, 447 U.S. at 720.[7]

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[7] Petitioner's argument, if successful, would rekindle the jurisdictional question anew. Future plaintiffs would argue that particular injuries occurred in the twilight zone and not in wholly maritime areas, in order to obtain the possibility of a state tort remedy in addition to a compensation remedy under the Longshore Act. Employers would argue the opposite. By contrast, the jurisdictional issue was easily dealt with in the present case, just as the jurisprudence of the twilight zone was intended to work. The court of appeals was able to use a "pragmatic approach" in resolving this question and hold that it would be "unreasonable to require the injured worker to demonstrate precisely how much of his injury is attributable to shoreside exposure." Pet. App. at 30a-31a. But that approach -- exactly what the twilight zone rationale encourages -- would clearly be out of place where resolution of the jurisdictional issue would determine whether the employee was entitled to seek a state tort law recovery as opposed to the federal Longshore Act remedy.

The coexistence that petitioner seeks in this case of a state damage remedy for negligence with the Longshore Act compensation remedy would disserve the twilight zone goal of facilitating access to a compensation remedy. Under the Longshore Act, HOVIC as employer accepts no-fault liability for every injury "in exchange for immunity from tort liability for damages." Pet. App. at 33a. But under petitioner's view, this balance is thoroughly destroyed. HOVIC and all other employers would have to provide for no-fault liability in every case but still be subject to tort liability in any case in which an employee can obtain recovery. Employees would gain the certain, no-fault remedy without giving up the right to sue for more in tort. In petitioner's view, then, for injuries in the twilight zone in the Virgin Islands, HOVIC gains no *quid pro quo* and borrowed employees give up nothing. The court of appeals correctly held that such results were impermissible because the twilight zone was recognized in order to assure access to workers' compensation remedies, not to undermine them. Pet. App. at 35a. There is no support, in caselaw or anywhere else, for petitioner's assertion that the existence of the twilight zone in any way preserves an employee's state negligence remedy against an employer which, like HOVIC, is fully participating in both the federal and Virgin Islands workers' compensation schemes.

Indeed, petitioner does not even seek to counter the court of appeals' holding that petitioner's lawsuit, if successful, would "obstruct[] the purposes of [the Longshore Act]" (Pet. App. at 36a). Since this Court has held that the twilight zone was created to facilitate access to compensation remedies (*Davis*, 317 U.S. at 254-255), the relief petitioner seeks would also injure the purposes for which the twilight zone was created.

III. Petitioner's Other Attempts To Suggest Conflicts Or Inconsistencies Do Not Merit Review By This Court.

The court below correctly pointed out (Pet. App. at 34) that its decision was consistent with those of the only other circuit that has considered whether the Longshore Act preempts state actions based on tort theories. *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083 (5th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Lorton v. Diamond M Drilling Co.*, 540 F.2d 212 (5th Cir. 1976). Petitioner asserts, however, that the decision of the court below conflicts "in principle" with that of the Louisiana Supreme Court in *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976), *appeal dismissed for want of jurisdiction*, 434 U.S. 803 (1977). Pet. at 17. As petitioner's careful qualification suggests, however, *Poche* concerned a different issue (liability of co-workers and officers). Perhaps more importantly, the 14-year old result in *Poche* has had practically no precedential effect. As reflected in the *Poche* opinion itself (339 So. 2d at 1221 n. 7), at the time of the decision the state legislature of Louisiana had already amended the state compensation law to bar such suits consistently with the provisions of the Longshore Act and with other state-court decisions. *See Fillinger v. Foster*, 448 So. 2d 321, 325 (Ala.) *cert. denied*, 469 U.S. (1984); *Smalls v. Blackmon*, 269 S.C. 614, 239 S.E.2d 640 (1977). Much more recently, in fact, the Louisiana Court of Appeals has held, consistently with the Third Circuit here, that a state tort action against a borrowing employer is barred by section 905(a) of the Longshore Act. *Sider v. Robin Temporary Service*, 515 So. 2d 1123, 1130-1131 (La. Ct. App. 1987), *writ*

denied, 519 So. 2d 146 (La. 1988).[8] Petitioner cites no other case, state or federal, to support its assertion that an employee injured in the twilight zone may recover in tort under state law in circumstances in which the Longshore Act would bar tort recovery.[9]

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[8] Petitioner claims that the *Sider* opinion does not disclose whether the employee's injury occurred in the "twilight zone." Pet. at 18 n. 15. But the plaintiff there was injured while *cleaning barges* on the Mississippi River, a twilight zone case if there ever was one. 515 So. 2d at 1124. And nowhere other than the "twilight zone" could section 905(b) of the Longshore Act preempt a state tort action. If the action had been wholly inland, the Longshore Act could not have applied; had it been clearly wholly maritime, state remedies could not constitutionally have applied, pursuant to *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), regardless of the provisions of the Longshore Act relied on in the opinion. Thus it is clear that Louisiana law is in accord with the Third Circuit's decision in the present case.

Petitioner also asserts that *Sider* merely involved state negligence actions against the vessel by virtue of 33 U.S.C. § 905(b). This is incorrect; Sider also sued the borrowing employer and the officers of the borrowing employer in tort (515 So. 2d at 1124); these claims were barred by the Louisiana court at pp. 1130-31.

[9] Petitioner also asserts that the Fourth Circuit's decision in *Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910 (4th Cir.), *cert. denied*, 479 U.S. 914 (1986) is inconsistent with that of the Third Circuit here. But *Garvin* – in which the Fourth Circuit held that state law *barred* an employee's recovery in tort against a non-employer – is plainly a wholly different case. It involves a provision not involved in the present case – the "statutory employer" provision added to the Longshore Act in 1984, pursuant to which a prime contractor is the "employer" of a subcontractor's employee (and thus is immune from suit) only if the subcontractor has failed to secure payment of worker compensation. 787 F. 2d at 916. Under South Carolina law, such a contractor was immune from suit by the employee in any event, *id.* at 911. The Fourth Circuit held that the contractor was immune from suit under South Carolina law even though the Longshore Act did not provide immunity. It held that the state rule could apply because the state law, although different from the rule under the Longshore Act, "was not in conflict" with it;

(continued...)

IV. This Issue Is Not Of Sufficient Importance To Warrant Review By This Court.

This case presents an unusual situation unlikely of repetition. The general rule, among state and federal jurisdictions, is acceptance of the borrowed employee concept in determining who is the employer for workers' compensation. *See* 1C Larson, *The Law of Workmen's Compensation* § 48 at

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[9] (...continued)
and that "[t]he federal and state statutes are readily harmonized, and each may function in its own sphere without interference with the other." *Id.* at 917-918.

By contrast, in the present case the Third Circuit found that the successful imposition of state-law negligence liability on HOVIC would indeed "undermine the policy reflected in section 905(a) [of the Longshore Act]" because that "act is premised on the notion that employers will accept the burden of no-fault compensation recovery in exchange for predictable liability for injuries suffered by workers" and would "obstruct[] the purposes of [the Longshore Act] by depriving maritime employers of their side of [the Act's] *quid pro quo*" Pet. App. at 35a, 36a.

Petitioner points out that, dissenting from denial of certiorari in *Lewis v. Modular Quarters,* 487 U.S. 1226 (1988), Justices White and Blackmun saw a conflict between the holding in *Garvin* and those of the Fifth Circuit in *Gates v. Shell Oil,* 812 F.2d 1509 (5th Cir. 1987), *cert. denied,* 110 S. Ct. 1320 (1990) and *Martin v. Ingalls Shipbuilding,* 746 F.2d 231 (5th Cir. 1984)(*per curiam*). However, that disagreement has also to do with the effect of the particular preemptive language in section 905(a) concerning the liability of prime contractors to employees of subcontractors and not here at issue. The distance of that issue from the present case is shown by the fact that, in *Gates,* state law applied not by virtue of the twilight zone, but pursuant to the particular formula in the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A). *Gates*, 812 F.2d at 1513.

pp. 8-405 -- 8-548 (1990).[10] The Virgin Islands statute rejecting the doctrine, 24 V.I.C. § 263a, appears to be unique. Therefore it does not seem likely that this issue will repeat itself.

V. This Case May Not Present The Issue Raised In The Petition.

It also appears, because of another issue specifically preserved by the court of appeals, that this case may not present the issue urged in the petition. *Cf.* Rule 15.1 of this Court's Rules. After the court of appeals issued the opinion of which petitioner here seeks review, the petitioner sought rehearing in the court of appeals, raising for the first time in that court an argument that the Longshore Act does not apply at all to the territorial waters of the Virgin Islands. The court of appeals denied rehearing on the ground that the issue had been raised too late. Pet. App. at 39a-41a. In doing so it "expressly decline[d] to express an opinion on whether [the Longshore Act] covers the territorial waters of the Virgin Islands . . . ." although it went on to state some doubt about petitioner's view on the issue. Pet. App. at 40a n. 2.

While HOVIC strongly believes that the petitioner is in error on this point and that the Longshore Act does apply to the territorial waters of the Virgin Islands, two facts remain: *first,* the issue remains open, expressly preserved by the court of appeals; and *second,* assuming *arguendo* that in accord with petitioner's view the Longshore Act does *not* so apply, the issue presented in the petition would evaporate, since if the

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[10] In his extensive discussion of the borrowed employee doctrine, Professor Larson cites only one jurisdiction -- the Virgin Islands -- where it does not apply (*see* 1C Larson, *supra* (December 1989 Cum. Supp.) at pp. 47-48.

Longshore Act did not apply, it could not preempt Virgin Islands law. Thus, in the present case if certiorari were granted, petitioner's first argument on the merits would have to be that the Longshore Act does not apply to the Virgin Islands and that the issue raised in the petition for certiorari was moot. While HOVIC would then strongly urge that the Longshore Act is applicable, we question whether this Court would wish to decide the issue of applicability of the Longshore Act to the Virgin Islands. The issue is of no general importance; it has not -- because of the petitioner's failure to raise it -- been considered by the court of appeals;[11] and it has the potential of mooting the issue raised in the petition.

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[11] Even if petitioner could appropriately forego raising this issue on the merits in this Court, that would, of course, leave the issue undecided with the potential of rendering this Court's ruling on the merits without any effec. in future cases.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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